UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

In re:

EARL KENNETH SAGEMAN, JR., Case No. 05-22196
Chapter 12

Debtor. Hon. Walter Shapero
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OPINION GRANTING UNITED STATES OF AMERICA'S/FARM SERVICES AGENCY'S MOTION TO DISMISS CHAPTER 12 CASE

I. Background

Before the Court is the Motion of the United States/Farm Services Agency ("FSA") to dismiss Debtor's Chapter 12 case ("Chapter 12 Case"). The Chapter 12 Case was filed on May 11, 2005. At the time of the filing of this Chapter 12 Case, Debtor had, and continues to have, a pending Chapter 7 case, being Case No. 04-24407, ("Chapter 7 Case"). A hearing was held on the instant Motion on July 21, 2005, and the Court took the matter under advisement.

A. Still Pending Chapter 7, Case No. 04-24407

On November 2004, Debtor, in pro per, filed a Chapter 11 case. The United States Trustee filed a motion to convert on January 31, 2005, alleging as grounds: (1) the fact of Debtor's three prior bankruptcy filings; (2) Debtor's failure to provide required documents and information; (3) inaccurate information in the filed schedules; as well as (4) other grounds. On March 18, 2005, an Order was entered converting the case to a Chapter 7 case, following which the Chapter 7 trustee was appointed. The trustee filed a no asset report on May 2, 2005. Previously in the Chapter 7 Case, FSA, a secured creditor, filed: (1) a motion for relief from

stay, which was granted on April 8, 2005; (2) an adversary proceeding (A.P. No. 05-2021) seeking denial of Debtor's discharge under Section 727(a)(2)(A), (a)(2)(B), and (a)(5), and nondischargeability of certain debts owed it under Section 523(a)(10); and (3) a motion for abandonment of its collateral consisting of both real and personal property, which was not objected to and was granted on June 10, 2005.

On May 11, 2005, Debtor filed a motion to dismiss his Chapter 7 Case. FSA objected to Debtor's motion to dismiss, and a hearing was held on June 2, 2005, the Court taking that matter under advisement. On July 6, 2005, before the Court issued its decision, Debtor withdrew his motion to dismiss.

B. Chapter 12, Case No. 05-22196

The Debtor, again in pro per, filed the instant Chapter 12 case on May 11, 2005, the same date as he filed his motion to dismiss the Chapter 7 Case. Debtor initially only filed the Chapter 12 petition, and later filed schedules and other required documents, albeit untimely, on June 16, 2005.

II. Analysis

A. Pendency of Two Cases at Same Time

As noted, the Chapter 12 Case was commenced the same day Debtor filed a motion to dismiss his Chapter 7 Case (a motion which he withdrew prior to the hearing on the FSA's Motion to Dismiss this Chapter 12 case). Debtor had, however, lost the protection of the automatic stay in the Chapter 7 Case, as related to FSA, his principal secured creditor by Order granting FSA's motion for relief from stay, entered on April 8, 2005, and by Order granting FSA's motion for abandonment of its collateral consisting of both real and personal property,

entered on June 10, 2005. The Chapter 12 renewed that automatic stay, but created the conundrum currently before the Court. Debtor has not yet received a discharge due to the pendency of FSA's above-described action seeking denial of Debtor's discharge. Thus, it is undisputed that Debtor has two bankruptcy cases currently pending.

This fact alone, the Court concludes, warrants dismissal of the Chapter 12 Case. The majority view holds that debtors may maintain only one active bankruptcy case at any one time. In an unpublished decision, the Sixth Circuit Court of Appeals recognized this majority rule. In the case of *Gateway North Estates, Inc. v. Jude (In re Gateway North Estates, Inc.)*, 1994 WL 610167 (6th Cir. 1994), the Sixth Circuit, in dismissing as moot an appeal filed in a second, simultaneous bankruptcy filing, noted that:

> a debtor may not have pending simultaneously petitions for relief under separate chapters of the Bankruptcy Code. That rule is generally grounded in *Freshman v. Atkins*, 269 U.S. 121 (1925), in which the Supreme Court held that the pendency of a petition in bankruptcy precluded the discharge of the same debts in a second petition. To allow such duplicative filings as a general rule would sanction "an easy avenue for abuse of the bankruptcy system...."

Id. at *2 (quoting *In re Fulks*, 93 B.R. 274, 276 (Bankr. M.D. Fla. 1988) (other citations omitted). *See also In re Bodine*, 113 B.R. 134, 135 (Bankr. W.D.N.Y. 1990) (holding that simultaneous bankruptcy petitions are not allowed and citing various decisions agreeing with the majority view); *In re Smith*, 85 B.R. 872, 874 (Bankr. W.D. Okl. 1988) (in disallowing concurrent filings, stating that "debtors could undertake numerous simultaneous filings when events in one case take a turn to their disliking."). A minority view holds that once a debtor has been granted a discharge in a Chapter 7, a subsequent bankruptcy under a new chapter may be commenced to deal with the debts not discharged in the Chapter 7. *See In re Kosenka*, 104 B.R. 40 (Bankr. N.D. Ind. 1989).

While this Court agrees with the majority view, and would and will apply it here, it is also true that since the Debtor has not yet received his discharge in the Chapter 7 Case, the minority rule also requires dismissal, because it permits two cases to be pending, but only if the debtor has already received his discharge in the Chapter 7 case that is one of the two pending cases. Also, under the facts in this situation, the Chapter 12 filing presents the same, if not more egregious, scenario described and held improper by the *Smith* Court of a debtor being displeased with the turn of events in a first case, then filing a second case during the pendency of the first to somehow undo previous adverse events in the first case, or proceed forward as if the adverse events in the first case never happened. To allow Debtor to maintain two separate bankruptcy filings, particularly considering the adverse events occurring in Debtor's Chapter 7 Case, would amount to nothing more than a Court-sanctioned intolerable abuse of the bankruptcy system. Thus, Debtor's second filing–this Chapter 12 Case–must be dismissed.

B. <u>Chapter 12 Eligibility Under Section 109(f)</u>

Even if somehow the minority view would allow for these two simultaneous bankruptcies, a second basis exists for dismissing this Chapter 12 case–that is the Debtor's ineligibility to be a Debtor under Chapter 12 of the Bankruptcy Code. Section 109 of the Bankruptcy Code defines who may be a debtor under the various chapters of Title 11. Specifically, subsection (f) addresses eligibility under Chapter 12:

> Only a family farmer with regular annual income may be a debtor under chapter 12 of this title.

A "family farmer with regular annual income" is defined in Section 101(19) as a:

> family farmer whose annual income is sufficiently stable and regular to enable such family farmer to make payments under a plan under Chapter 12 of this title

The Code's definition of "family farmer," as applicable to individuals, is found in Section 101(18)(A), which states:

"family farmer" means--

> (A) individual or individual and spouse engaged in a farming operation whose aggregate debts do not exceed $1,500,000 and not less than 80 percent of whose aggregate noncontingent, liquidated debts (excluding a debt for the principal residence of such individual or such individual and spouse unless such debt arises out of a farming operation), on the date the case is filed, arise out of a farming operation owned or operated by such individual or such individual and spouse, and such individual or such individual and spouse receive from such farming operation more than 50 percent of such individual's or such individual and spouse's gross income for the taxable year preceding the taxable year in which the case concerning such individual or such individual and spouse was filed;

Debtors Chapter 12 schedules indicate that his debts fall well under the $1,500,000 cap. However, Question No. 1 of Debtor's Statement of Financial Affairs, asking Debtor to state "gross amounts received during the two years immediately preceding this calendar year," is answered in the following manner:

Amount	Source (if more than one)
$600	outside mechanic work

The conclusion that Debtor did not receive any, let alone the requisite 50 percent, of his gross income from a farming operation in 2004–the taxable year preceding this case–was confirmed by the Debtor at the July 21, 2005, hearing on the instant Motion. In answering the Court's questions, Debtor stated on the record that: he has not filed an income tax return since 1999; he did not plant any crops in 2004; he had no resulting income from crops in 2004; he did receive approximately $4,000 in 2004 from government-sponsored disaster crop insurance payments; and he received about $7,200 in 2004 from "odds and ends work" unrelated to farming. While

proceeds received from government farm programs will typically be considered income from farming operations, *see In re Shepherd*, 75 B.R. 501, 504 (Bankr. N.D. Ohio 1987), the amount received–approximately $4,000–is less than 50 percent of the total gross income–approximately $11,200 ($4,000 plus $7,200)–Debtor stated he received in 2004. Thus, the Court concludes that Debtor is not a "family farmer with regular annual income," and is accordingly ineligible to be a debtor under Chapter 12 of the Bankruptcy Code pursuant to Section 109(f).

C. FSA's Request for 180-Day Bar to Refiling

FSA also asks the Court to impose upon Debtor a 180-day bar to refiling future bankruptcies under any chapter of Title 11. Because that issue requires an evidentiary hearing, the Court will not make a decision on that request at this time, but will schedule an evidentiary hearing on that issue upon the written request of FSA filed and served upon the parties listed below.

III. Conclusion

For the foregoing reasons, Debtor's Chapter 12 bankruptcy case is dismissed. The Court reserves its decision on FSA's request for a 180-day bar to refiling until an evidentiary hearing is held thereon. An appropriate Order will enter.

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WALTER SHAPERO
United States Bankruptcy Judge

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